(2)

No. 91-582

In The

Supreme Court of the United States

October Term, 1991

ELIZABETH LAYMAN,

Petitioner,

v.

XEROX CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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SUBSIDIARIES OF XEROX CORPORATION

Xerox Corporation does not have a parent corporation. Its nonwholly owned subsidiaries are as follows:

AMTX, Inc.
Advanced Forming Technology
Century Data Systems, Inc.
Copicentro S.A.
GESCAN International
Image Sciences, Inc.
Katun Corporation
Kurzweil Applied Intelligence
Optimem
Opto Generic Devices, Inc.
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Rank Xerox Investments Limited
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Fuji Xerox Co., Ltd.
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Modi Xerox Limited
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Respondent, Xerox Corporation ("Xerox"), respectfully requests that this Court deny the petition for writ of certiorari of petitioner, Elizabeth Layman ("Layman").

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Generally, Xerox does not disagree with Layman's statement of the procedural history of this case in the courts below. However, with regard to the partial summary judgment entered on August 11, 1989, the trial court held that, because she had enrolled as a full-time student at St. Mary's University School of Law in San Antonio,

Texas, in August 1987, while she was still a full-time employee of Xerox near Dallas, Texas, Layman could not recover future pay, nor could she receive back pay for the time that duplicates time spent in law school. Memorandum Opinion and Order of Aug. 11, 1989 at 2-3.

Layman asserts that, with regard to Xerox' Motion and Brief to Alter or Amend Memorandum Opinion and Order and Request for Ruling on Motion for New Trial, the trial court "entered its Order denying Xerox's request for the conditional granting of a Motion for New Trial." Pet. at 3. This is not correct. The trial court conditionally *granted* a new trial to Xerox "in the event that this court reverses its JNOV but that, in any event, a new trial should not be granted on Xerox's counterclaim." Pet. App. A at 7a.

B. STATEMENT OF FACTS

Xerox particularly disagrees with Layman's statement of the relevant facts in this case. Since Layman's petition is at its heart nothing more than an attempt to persuade this Court to review the legal sufficiency of the evidence, it is important to set out the relevant uncontradicted evidence on which the trial court based the judgment notwithstanding the verdict ("JNOV"), as affirmed by the court of appeals. The lower courts held that Layman failed to prove her claims as a matter of law.

Layman was employed by Xerox on May 27, 1980, when she was 37 years old. PX-110118. In November, 1982, she was named Software Marketing Manager in the internal organization known as Office Products Division ("OPD"). Tr. 1B:25-26; PX-110146. Due to a reorganization

in November 1983, which affected a large number of employees in OPD, Layman was assigned to the position of Manager of Business Development. *Id.*; Tr. 1B:54; 12:117-21. Layman's salary was not affected but her grade level was changed back to a grade 14 from grade 15 effective November 1, 1983. PX-110118. During her entire employment with Xerox, she received at least a merit salary increase every year. *Id.* By the time she left Xerox, Layman was earning $65,112.00 annually. *Id.*

Because Layman was dissatisfied with the job changes in November 1983, Layman availed herself of Xerox' open door policy and wrote a letter directly to David Kearns, president of Xerox. Tr. 3:17. In her letter of June 7, 1984, she complained about four matters which she alleged were acts of discrimination. *See* PX-200155-69. None of her complaints accused Xerox of having discriminated against her on the basis of her age. *Id.* Kearns responded to Layman by his letter of July 20, 1984, in which he addressed each of Layman's four complaints. PX-200173. After she received Kearns' July 1984 response to her open door letter, Layman learned by late summer 1984 that Joan Bigham had been assigned to a position also called Software Marketing Manager. TR. 1B:55. She responded, "[T]hat's my job," and began trying to find out who Bigham was. Tr. 3:115-16. As soon as she heard of Bigham's job, Layman investigated the job duties. Tr. 3:111. She testified at trial that, after her investigation, she did not believe the two jobs were the same. Tr. 1B:55. Even the job numbers were *not* the same. *See* PX-110118; DX-685A. Furthermore, Bigham's position was in a completely different organization than that in which Layman

worked, and Bigham reported to a different manager. PX-200175; Tr. 3:109.

After investigating Bigham and her new job as Software Marketing Manager, Layman accepted a position in Bigham's organization and started working for Bigham effective April 1, 1985, as Marketing Program Manager. Tr. 3:114-15; PX-110118. At trial, Layman offered no evidence that the duties of the two jobs titled Software Marketing Manager were the same. Furthermore, Layman offered no evidence as to what Bigham's duties were.

In 1986, Xerox made two major decisions which affected the jobs of many employees across the country, including Layman's group in Dallas. Tr. 9:28. First, Xerox decided to get out of the software business; second, Xerox consolidated its marketing functions in California under the management of Bob Knight, a vice president. Tr. 9:8-16, 31-32. On October 7, 1986, Knight announced to approximately thirty Dallas employees, including Layman, that all marketing functions under his management were being transferred to California. Tr. 4:118; 9:12-14. The employees were given the opportunity to relocate to El Segundo, California. Some functions would be transferred to El Segundo; others, including Layman's entire group headed by Bigham, were to be dissolved. In other words, Layman's group and their jobs ceased to exist. Tr. 3:134, 176. Many of the incidences of alleged harassment to which Layman refers in her petition, such as removing furniture and phones from her office and travel restrictions, related to the dissolution of Layman's group and relocation of offices from Dallas to Lewisville. *See, e.g.*, Tr. 5:32-33; 7B:83-84.

At the meeting, another employee asked Knight if there would be a job for everyone who wanted to go to El Segundo; Knight responded, yes, which was consistent with the written materials given to the employees. The written package relating to the October 7 meeting included the following question and answer:

> Is there a job for everyone who wants to go to El Segundo?
>
> Yes, positions will be available for exempt employees who want to move to El Segundo, CA.

PX-200688. No promises were made as to the specifics or qualities of the jobs in California, as is shown by another question and answer from the written package:

> Will the California positions be at the same level as my current position?
>
> There is no intention of either reducing or increasing overall grade levels in restructuring the organization. On an individual basis, the impact is difficult to assess at this time. *There may be some cases where the only available position is lower than current grade level.*

Id. (emphasis added). Furthermore, no job guarantees were given to those employees who elected not to relocate. Tr. 7:94. They took their chances on finding, or not finding, other jobs within Xerox, since their jobs, like Layman's, no longer existed in Dallas. *See e.g.*, Tr. 7:56; 9:52-53.

All employees, including Layman, who expressed an interest in relocating were invited to El Segundo in late October 1986, to view the area and to meet real estate

brokers in order to assess their desire to move and take a job in El Segundo. PX-200696; PX-200700; Tr. 9:44-45.

On November 10, 1986, Layman informed Xerox that she would relocate. PX-112605. In addition, she attempted to expand the parameters of Knight's offer for a job by requesting that her offer be for her "current for a comparable" job and that the appraisal/selling process of her house in Lewisville progress according to plan – additions which were not part of the October 7 promise. *Id.* In her petition, Layman states unequivocally that "Xerox accepted the condition." Pet. at 5. However, she admits that on November 17, 1986, Eva Sage, the personnel manager responsible for Layman's group, told Layman that these "conditions" were not acceptable to Xerox. DX-371; *see also* Tr. 9:114.

At Layman's request, Xerox obtained independent appraisals to establish the market price for her house and, through Merrill Lynch, offered to buy Layman's house at that price. Although she could have kept the house or sold it on her own, Layman accepted the offer on January 19, 1987 (a month before the offer expired), and closed on the sale on January 23, 1987. PX-200707; DX-34. Xerox paid Merrill Lynch $20,063.82 in closing costs for the purchase and subsequently resold the house at a loss. Tr. 9:43; 10:32.

On November 18, 1986, Layman wrote to Knight expressing her frustration at not having information on her job. PX-200711. In addition to instructing Layman's manager to assist, Knight responded directly to Layman on November 21, 1987, to confirm that he had received her letter. PX-112605; PX-110200. Knight also stated, "I'll

be happy to meet with you at your convenience," after Layman's manager had a chance to provide her with information. PX-110200. There is no evidence that, after she received Knight's letter, Layman ever sought a meeting, information or clarification from Knight.

Layman's manager, Bigham, and personnel representative, Sage, arranged for an interview with Bill McKissock, a Xerox manager in El Segundo. Tr. 5:25-26; 9:91-93. Layman subsequently flew to El Segundo at Xerox' expense and met with McKissock to interview for a job. PX-200747. McKissock was then trying to put together his new organization under Knight to handle desktop publishing. Tr. 6:71-72. A position for Layman never materialized because McKissock did not receive approval to set up the department he had proposed. Tr. 5:62-63; 9:90-93.

In February 1987, Sage suggested that Layman contact three other managers to discuss jobs. Tr. 9:97-98; PX-200777. Layman never fully followed up on these suggestions, but she did meet with Larry Spelhaug in March 1987 in El Segundo. Tr. 5:63-65. In all, Xerox paid for Layman to travel to El Segundo at least three times – in October and December 1986 and March 1987 – either to view the area or to discuss possible jobs. PX-200747; PX-200700; Tr. 5:69; Tr. 6:56-57.

Spelhaug, who worked in Knight's organization, first offered Layman a job in early April 1987, with the title of Manager Special Projects, at a lateral grade 14, at a monthly salary of $5,697.00 (a 5% increase), to-be effective April 1, 1987. The job provided all the relocation benefits discussed at the October 7, 1986, announcement meeting.

PX-110217. Layman rejected the job over the telephone and instructed Spelhaug not even to bother sending her the written offer. On May 11, 1987, Layman filed her complaint with the Equal Employment Opportunity Commission ("EEOC"). DX-243.

Meanwhile, Layman had already taken the Law School Admissions Test on September 27, 1986. She began applying to Texas law schools[1] on November 6, 1986 (four days before she told Xerox she was willing to move to California) and was finally accepted by St. Mary's University School of Law located in San Antonio, Texas. DX-35; DX-24; DX-25; Tr. 6:57. On June 15, 1987, Layman bought a house in San Antonio, Texas. DX-33.

On July 22, 1987, Spelhaug telephoned Layman about another position in California. Tr. 6:114-15. Spelhaug read to Layman an offer dated July 13, 1987, for a position entitled Desktop Publishing Markets Manager. PX-200848; PX-110220. The position provided for a lateral transfer at grade 14, a 5% increase in salary and full relocation benefits. PX-110220; PX-200688.

On August 12, 1987, just two days after admittedly receiving the written offer, Layman wrote to Spelhaug to inform him that she would be on vacation until the end of September. Tr. 6:127-28; PX-200851. She started law school in San Antonio as a full-time student on August 24, 1987. Tr. 6:129. Finally, on September 26, 1987, Layman sent a memo declining the position offered and requesting advice regarding the procedure for salary continuance. PX-200856; Tr. 6:129.

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[1] She applied only to Texas law schools.

While attending law school full-time, Layman continued to be employed full-time by Xerox and to receive full salary and benefits through February 9, 1988. Tr. 6:130-36. She still had not told Xerox that she had enrolled in law school or bought a house in San Antonio. Tr. 6:115. From February 9, 1988, through August 9, 1988, she received salary continuance in the full amount of her salary of $5,426.00 per month plus benefits. Tr. 6:140. Thus, in total, Xerox paid Layman eleven full months' salary of $59,686.00 plus benefits after she entered law school in San Antonio as a full-time student. She finally gave Xerox her San Antonio address on March 4, 1988, at her exit interview, but she *never* told any of her managers at Xerox that she had enrolled in law school while she was still ostensibly working for Xerox. Tr. 6:64-66, 115, 127, 129, 130, 140, 157; 7:66, 83; PX-200877.

REASONS FOR DENYING THE PETITION

I. SUMMARY OF REASONS FOR DENYING THE PETITION

This case is not worthy of review by this Court. What Layman really seeks is a review of the sufficiency of the evidence which she produced at trial on the merits. Two lower federal courts have already thoroughly performed that task. Indeed, the district court rendered JNOV against Layman *only* after reviewing the entire trial transcript and after exhaustive briefing by both parties. Both lower courts reached identical decisions – Layman simply failed to prove her case.

Contrary to Layman's contention, there is no conflict between the standards applied by the Fifth Circuit to Layman's continuing violation theory and the standards applied by other circuit courts. The so-called "three part test" applied by the Fifth Circuit is not a test at all but merely an articulation of three possible considerations to be used in determining whether, under the facts and context of each case which involves a series of alleged related acts, a plaintiff has shown a sufficient relationship between the alleged acts to allow the plaintiff to recover for acts committed outside the ADEA limitations period. The results of the inquiry are thus fact specific: "This inquiry, of necessity, turns on the facts and context of each particular case." *Berry v. Board of Supervisors of Louisiana State Univ.*, 715 F.2d 971, 981 (5th Cir. 1983), *cert. denied*, 479 U.S. 868 (1986). *Berry* correctly states the law on this issue, and the other circuits are in accord. Furthermore, the factors stated in *Berry*, as applied by the Fifth and other circuits, are consistent with controlling decisions of this Court.

Even if Layman were correct in arguing that there is a conflict among the circuits, this is not an appropriate case for reviewing the continuing violation theory. Layman argues that other circuits only look to whether a discriminatory policy is in place. However, even if her argument were correct, Layman offered absolutely no evidence of a discriminatory policy which caused the alleged disparate treatment. Finally, Layman admits in her petition that all circuits require a plaintiff to prove a discriminatory act within the statutory period in order to invoke the continuing violation theory. After a thorough review of the transcript of the entire trial and after

exhaustive briefing by both parties, the courts below concluded that Layman had failed to prove a violation of the ADEA based on any alleged act within the 300-day filing period. Thus, because she did not establish a violation within the 300-day filing period, Layman cannot succeed on her continuing violation theory.

With regard to the two-part second question presented by Layman in her petition, there is no substantial evidence to support Layman's fraud claim, which is based on the promise Knight made to approximately thirty employees in October 1987, to provide jobs to everyone who would volunteer to relocate to California. The promise was not false, because Xerox substantially performed Knight's promise by, among other things, paying for her trips to California and giving her two separate job offers which would have provided her a marketing job in Knight's organization at a salary increase and with full relocation benefits. Layman rejected both of these offers.

Post-trial, Layman attempted to allege a completely new theory of fraud based on the allegation that she was told there were no jobs in Dallas, and that this statement was false. The trial court properly held that this new theory was not included in the pretrial order. However, even if the theory had been in the pretrial order, Layman failed to prove this claim. She never offered any evidence as to who supposedly made the statement to her, nor is there any evidence of when this statement was allegedly made. Thus, there is no evidence that the representation was false at the time it was made and no evidence that when it was made the speaker knew it was untrue. For these reasons Layman's petition should be denied.

II. THERE IS NO CONFLICT AMONG AND WITHIN THE CIRCUIT COURTS OVER HOW TO APPLY THE EQUITABLE THEORY OF "CONTINUING VIOLATIONS"

Contrary to Layman's contention, there is no conflict between and among the circuit courts in their application of the statute of limitations in ADEA cases. Layman bases her argument on an incorrect reading of Fifth Circuit cases and an incomplete reading of authority from other circuits. At page 9 of the petition, she cites a total of four cases which allegedly conflict with the Fifth Circuit (one each from the First, Ninth, Tenth and District of Columbia Circuits), declares these to be a "majority" of the circuits, and asks this Court to adopt what she erroneously contends is the general rule stated by these cases. As Xerox will demonstrate, these and other circuit courts are not in conflict in how they determine whether a continuing violation exists to toll the limitations period in ADEA cases. There is thus no reason for this Court to grant writ of certiorari to adopt a standard which the circuit courts, including the Fifth Circuit, are already applying.

As a threshold matter, Layman incorrectly characterizes *Berry v. Board of Supervisors of Louisiana State University*, 715 F.2d 971 (5th Cir. 1983), *cert. denied*, 479 U.S. 868 (1986), as creating a "cumbersome three part test" for determining whether a continuing violation exists. On the contrary, the Fifth Circuit makes it perfectly clear in *Berry* that determination of a continuing violation *cannot* be reduced to a formula, and that the factors suggested are not all inclusive:

> Courts have not formulated a clear standard for determining when alleged discriminatory acts

> are related closely enough to constitute a continuing violation and when they are merely discrete, isolated, and completed acts which must be regarded as individual violations. . . . This inquiry, of necessity, turns on the facts and context of each particular case. Relevant to the determination are the following three factors, which we discuss, but by no means consider to be exhaustive. . . . As noted, the particular context of individual employment situations requires a fact-specific inquiry by a trial judge which cannot be easily reduced to a formula. We feel, however, that consideration of the above factors will generally be appropriate.

Id. at 981-82. Thus, the *Berry* case does not establish a rigid set of steps to be followed in every continuing violation case, but simply articulates a guideline of three factors which ought generally to apply to continuing violation claims based on a series of allegedly related acts.

As a second incorrect premise, Layman fails to recognize that the factors outlined in *Berry* apply to only one of at least two different lines of inquiry which courts have used to determine whether a plaintiff can prove a continuing violation: "A plaintiff can prove a continuing violation *either* by producing evidence of a series of discriminatory acts *or* by demonstrating that the defendant has a policy of discriminating." *Waltman v. International Paper Co.*, 875 F.2d 468, 475 (5th Cir. 1989) (emphasis added). *See also, e.g., Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 183 (1st Cir. 1989) (serial violations are interlinked succession of related events; systematic violations involve some continuing policy); *Green v. Los Angeles*

County Superintendent of Schools, 883 F.2d 1472, 1480 (9th Cir. 1989) (continuing violation can be established by series of related acts or company-wide policy); *EEOC v. Penton Indus. Publishing Co.*, 851 F.2d 835, 838 (6th Cir. 1988) (same); *Roberts v. Gadsden Memorial Hosp.*, 835 F.2d 793, 800-01 (11th Cir. 1988) (same); *Bruno v. Western Elec. Co.*, 829 F.2d 957, 961 (10th Cir. 1987) (same); *McKenzie v. Sawyer*, 684 F.2d 62, 72 (D.C. Cir. 1982) (same).

The cases which Layman cites as demonstrating a conflict between the Fifth Circuit and other circuits concern only complaints of discrimination based on a company policy, not complaints based on a series of related acts. *See Johnson v. General Elec.*, 840 F.2d 132, 136 (1st Cir. 1988) (if statutory violation occurs as a result of continuing illegal policy, then the statute does not foreclose action aimed at enforcement of policy during limitations period); *Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 614 (10th Cir. 1988) (alleged discriminatory acts occurred under a continuing company policy); *Furr v. AT&T Technologies, Inc.*, 824 F.2d 1537, 1543 (10th Cir. 1987) (management report introduced into evidence to show overall company policy of age discrimination; claim of age discrimination may be based on continuing policy as long as employer continues to apply policy within limitations period); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 924 (9th Cir.), *cert. denied*, 459 U.S. 971 (1982) (employees entitled to pursue claims outside limitations period if they could show discriminatory policy carried forward into limitations period); *McKenzie v. Sawyer*, 684 F.2d 62, 72-73 (D.C. Cir. 1982) (employer's promotion policies and selection policies formed part of same pattern of discrimination). These cases thus are not relevant to cases which

review continuing violation claims based on a series of acts. Indeed, when these same circuits have reviewed continuing violation claims based on a series of allegedly related acts, these courts have applied some or all of the *Berry* factors.

In *Sabree v. United Brotherhood of Carpenters & Joiners Local No. 33*, 921 F.2d 396, 400 (1st Cir. 1990), the First Circuit recognizes the two lines of continuing violations: a series of related acts (which it terms serial violations) and a discriminatory policy (which it calls systemic violations). *See also Mack*, 871 F.2d at 183-84 (discussing the difference between serial violations and systemic violations). The *Sabree* case, which involves a series of allegedly related acts, or a serial violation, expressly applies one of the factors suggested by the Fifth Circuit in *Berry* to determine "whether a substantial relationship exists to justify an expanded remedy." *Sabree*, 921 F.2d at 401-02.

Similarly, in considering a claim based on a series of acts, the Tenth Circuit, in a case not cited by Layman, cites *Berry* for the proposition that "[t]he question in the present case thus boils down to whether sufficient evidence supports a determination that the 'alleged discriminatory acts are related closely enough to constitute a continuing violation.' " *Bruno v. Western Elec. Co.*, 829 F.2d 957, 961 (6th Cir. 1988) (citing *Berry*). The *Bruno* case does not expressly apply any of the factors suggested in *Berry*, but holds that the trial court's finding of fact that a series of events was sufficiently related and a continuing violation existed was not clearly erroneous under Fed. R. Civ. P. 49(a) and 52(a). However, the Tenth Circuit, first, recognizes the difference between a continuing violation based

on a company policy and one based on a series of related acts and, second, relies upon *Berry* for its holding on a claim based on a series of related acts.

The Ninth Circuit, in another case not cited by Layman, also discusses the difference in the two lines of claims based on an alleged continuing violation in *Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1480-81 (9th Cir. 1989). The *Green* case involves allegations of a series of incidents, which the court found to be separate, rather than related, acts. The Ninth Circuit did not discuss the *Berry* factors, but the court did acknowledge that *Berry* applies to those cases involving allegations of a series of related acts. Implicit in both the Ninth and the Tenth Circuits' reliance on *Berry* in these circumstances is the recognition that *Berry* is not some aberration in the law of continuing violation theory but properly states the rule that a series of alleged acts must be sufficiently related in order to justify tolling limitations under the continuing violation theory.

The *McKenzie* case cited by Layman was decided before *Berry*, and Xerox has been unable to locate a case from the District of Columbia circuit court of appeals which cites to *Berry*. Since the decision in *Berry*, however, the district courts of that circuit have consistently applied *Berry* to determine whether a series of acts is sufficiently related. *See Rochon v. Attorney Gen. of the United States*, 734 F. Supp. 543, 548 (D.D.C. 1990); *Shepard v. Adams*, 670 F. Supp. 22, 24-25 (D.D.C 1987).

In addition to the circuits cited by Layman, the Sixth and Eleventh Circuits have also relied upon *Berry* in reviewing continuing violation claims based on a series of

acts. In *EEOC v. Penton Indus. Publishing Co.*, 851 F.2d 835, 838 (6th Cir. 1988), the Sixth Circuit discusses the two categories of continuing violation claims and cites *Berry* under its discussion of claims based on a series of acts. The Eleventh Circuit relies upon, and applies, the factors set out in *Berry* in *Roberts v. Gadsden Memorial Hosp.*, 835 F.2d 793, 800-01 (11th Cir. 1988). Furthermore, the Eleventh Circuit notes that the factors listed in *Berry* are not exhaustive, *Id.* at 801, and then considers that the decisions on plaintiff's promotions were made by different decisionmakers in finding that a continuing violation did not exist.

In other circuits where Xerox has been unable to find citation to *Berry* by the courts of appeals, the district courts within most of those circuits have either applied the factors or cited to the *Berry* case as authority for decisions on the continuing violation theory. *See Wimberg v. University of Evansville*, 761 F. Supp. 587, 591-92 (S.D. Ind. 1989); *Caudill v. Farmland Indus.*, 698 F. Supp. 1476, 1482-83 (W.D. Mo. 1988); *Alveari v. American Int'l Group*, 590 F. Supp. 228, 231 (S.D.N.Y. 1984).

In the face of this overwhelming authority, Layman cannot in good faith argue that a conflict between the circuits exists as to how determinations regarding continuing violation claims should be made. The lower courts uniformly distinguish between continuing violation claims based on company policy and claims based on a series of allegedly related acts. The courts have correctly applied the *Berry* factors as a guideline for a case-by-case analysis of issues involving a series of acts to determine whether the alleged acts are sufficiently

related to permit application of the continuing violation theory to toll limitations under the ADEA.

These decisions of the courts of appeals and district courts, including the Fifth Circuit's decision in this case, are also consistent with this Court's controlling decisions. This Court has held that a plaintiff may not recover for an alleged act of discrimination which occurs outside the limitations period. *See Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 504, 66 L. Ed. 2d 431 (1980); *United Air Lines v. Evans*, 431 U.S. 553, 97 S. Ct. 1885, 1998, 52 L. Ed. 2d 571 (1977). The time for filing a charge of discrimination is, however, subject to the principles of waiver, estoppel and equitable tolling. *Zipes v. Trans World Airlines*, 445 U.S. 385, 102 S. Ct. 1127, 1132, 71 L. Ed. 2d 234 (1982). Consistent with these holdings, the decisions of the courts of appeals cited above allow a plaintiff to rely on the continuing violation theory only if there is an existing discriminatory company policy or a series of sufficiently related acts which extends into the statutory filing period. The factors suggested in *Berry* do nothing more than guide the lower courts in deciding this issue and assuring that a plaintiff does not recover for a stale claim. *See Ricks*, 101 S. Ct. at 505.

Layman must have either completely failed to research whether other circuits have followed *Berry* or deliberately ignored the consistent references to *Berry* in cases from other circuits. The flimsiness of her attempt to manufacture a conflict among the circuits confirms that Layman has no issue to present which is worthy of this Court's review.

III. THERE IS NO EVIDENCE OF A DISCRIMINATORY POLICY

Even if Layman could show a conflict in the circuits, however, this is still not an appropriate case for this Court to review. Layman never raised this so-called conflict in the courts below but brings it for the first time in her petition to this Court. Furthermore, even if the courts below had applied the rule she proposes – that is, that a continuing violation claim may be based on a continuing policy – Layman would not have succeeded on her claim. There is simply no evidence of a discriminatory policy. That there is no evidence to support her position is clear from her own petition filed in this Court; nowhere does she describe what policy was allegedly discriminatory. Further, Layman has not, and cannot, point to any discriminatory effect of some policy, had she proved the existence of one. The only statistics in evidence were offered by Xerox, and those statistics showed that the percentage of employees over 40 in the relevant grade levels increased from 77% in 1983 to 87% in 1987.

Layman relies heavily on *Glass v. Petro-Tex Chem. Corp.*, 757 F.2d 1554 (5th Cir. 1985) and *Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986), which are legally and factually distinguishable. First, these cases involve discriminatory policies, not a series of related acts. *See Glass*, 757 F.2d at 1560 (continuing policy disfavoring promotion of women); *Abrams*, 805 F.2d at 533 (unlawful policy of precluding Jewish doctors from rotating to hospital in Saudi Arabia). Second, the plaintiffs in both cases had been denied the exact same job three times. Layman, on the other hand, argues in her petition that a myriad of dissimilar events constitutes a continuing violation. The trial court correctly found as a matter of fact that these were individual events not

sufficiently related to invoke the continuing violation theory. As the Fifth Circuit noted in *Abrams*, the continuing violation theory "has to be guardedly employed because within it are the seeds of the destruction of statutes of limitation." 805 F.2d at 833. Last, Layman cannot succeed because she did not prove an actionable violation within the limitations period. Both the district and the appellate courts found as a matter of law that she had failed to prove a claim based on acts which were not barred by limitations. For these reasons, the petition should be denied.

IV. THE COURT OF APPEALS CORRECTLY HELD THAT LIMITATIONS WERE NOT TOLLED

Layman did not file her EEOC charge of discrimination until May 11, 1987. The 300-day limitations period established by the ADEA thus extends from July 16, 1986, to May 11, 1987. *See* 29 U.S.C. § 626(d)(2). Layman claims that the acts of age discrimination extend back to 1984.[2] However, the only back pay which she requested at trial was calculated on the differential between her salary and that of Joan Bigham, who in August 1984 allegedly was named to a position that Layman claims Xerox should have given her. Thus, unless she can toll the 300-day limitations period through application of the continuing

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[2] The trial court noted that she relied on many of these instances for the first time in post-trial briefing. Pet. App. B at 42a n.12.

violation theory,[3] Layman cannot recover any back pay – assuming arguendo that she could prove that the decision to give Bigham the position was an act of age discrimination.

Because neither party requested a jury issue on the continuing violation claim, the trial court was the factfinder under Fed. R. Civ. P. 49(a). Pet. App. B at 37a-38a. Even though, as factfinder, the trial court was not required to view the evidence in the light most favorable to Layman, the trial court's opinion reflects that it conscientiously searched the record for evidence which might support inferences favorable to her on her tolling claim. *See* Pet. App. B at 42a-47a. The trial court found, among other things, that "as of June 7, 1984 Layman believed she had been the victim of discrimination" and that the series of acts upon which she based her claim "were sufficiently discrete and completed acts that they must be regarded as individual events." Pet. App. B at 45a-46a. Under the authorities discussed in part II, above, these findings dispose of Layman's continuing violation claim. There is ample evidence to support the court's findings, which are not clearly erroneous. *See* Fed. R. Civ. P. 52(a).

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[3] Layman's argument in section II of her petition confuses three different tolling theories: equitable tolling, equitable estoppel and continuing violation. *See* Pet. at 13. The trial court thoroughly explained the distinctions between these theories in its opinion. Pet. App. B. at 39a-42a. Layman's arguments in her petition regarding Xerox' alleged concealment of facts is relevant only to the equitable estoppel theory and not to the continuing violation theory. The question which she has presented to this Court concerns only the continuing violation theory.

V. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT LAYMAN WAS NOT ENTITLED TO BASE HER CLAIM OF FRAUD ON THE ALLEGED MISREPRESENTATION OF NO AVAILABLE DALLAS JOBS

Layman also challenges the district court's ruling that her description of her fraud claim in the amended pretrial order was not broad enough to encompass a theory that Xerox committed fraud by representing that there were no jobs available in Dallas. Layman argues that a pretrial order should be construed to permit any issues at trial that are embraced within its language. However, the trial judge who presided during all the pretrial, trial and post-trial stages of this case determined that:

> Xerox could not be expected on the basis of these listed items to understand that Layman contended she had been defrauded on the basis of being affirmatively told no jobs existed in *Dallas*, especially given the way Layman's fraud claim in § 4(A)(3) is framed [in terms of no intent to find her a job in *California*].

Pet. App. B at 26a n.6 (emphasis added).

In asking this Court to second guess the trial judge's reading of the pretrial order and construe it differently, Layman overlooks the courts' long-standing reluctance to interfere with a trial judge's discretion in enforcing pretrial orders and the policy of encouraging trial judges to construe pretrial orders narrowly without fear of reversal. *See Flannery v. Carroll*, 676 F.2d 126, 129 (5th Cir. 1982)

(district courts encouraged to construe pretrial orders narrowly without fear of reversal).

The Fifth Circuit also recognized in *Flannery* that a broad construction of the pretrial order after the trial had ended "would mean that defendant would be facing the possibility of being held liable under a claim it had no opportunity to evaluate and defend against." *Id.* at 131. As the district court found, this is precisely the situation in this case. The no jobs in Dallas fraud theory emerged for the first time in the post-trial motions and would have constituted serious surprise to Xerox if the pretrial order had been interpreted to accommodate such a theory. Under all the circumstances, the court's construction of the scope of the pretrial order was not arbitrary and should be upheld. *See Nickerson v. G. D. Searle & Co.*, 900 F.2d 412, 422 (1st Cir. 1990).

Furthermore, the *sole* evidence on this theory is Layman's volunteered statement that she had been told "that there were no jobs in Dallas."[4] Tr. 4:166-67. Her ability to rely on this evidence is questionable because the trial court sustained Xerox' objection that this answer was nonresponsive to the pending question during Layman's direct examination. Tr. 4:167. However, even if this is competent evidence to support the jury verdict, Layman never testified as to who made this alleged statement or when it was made. Yet, the timeframe is critical to Layman's claim that the statement was false, because the job

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[4] Layman never referred to this allegation again. The absence of any other evidence on this fraud claim further supports the trial court's holding that this theory is one which Layman developed post-trial.

situation in Dallas in October and November 1986 was so uncertain that the statement could well have been true at the time it was made. *See, e.g.*, Tr. 4:170; 12:21-24. Accordingly, even if one assumes that the pretrial order ought to be read broadly to include Layman's new post-trial theory, Layman offered no substantial evidence that Xerox misled her by falsely representing the unavailability of jobs in Dallas.

VI. THE COURT OF APPEALS CORRECTLY HELD THAT LAYMAN DID NOT PROVE HER FRAUD CLAIM

The promise on which Layman bases her fraud claim was made by Knight at the October 7, 1986, meeting of about thirty Dallas-based employees held to announce the consolidation and resizing decision. He promised a job in California to those employees who volunteered to relocate. On November 10, 1986, Layman informed Xerox that she would relocate. Although she now claims that Xerox accepted her condition that any job offered be for her "current or a comparable job," she admits that Sage informed her that these conditions were not acceptable to Xerox. Layman's own handwritten notes of her conversation with Sage on November 17, 1986, confirm that Sage rejected Layman's attempt to condition her acceptance of the relocation on the availability of a comparable job. DX-371.

At trial, Layman never stated that anyone promised or agreed that her acceptance of the relocation was conditioned on the availability of a comparable job. As the trial court properly found:

> The record does not support, however, an inference that Xerox promised Layman such a job. Indeed, the only evidence of such a promise is Layman's November 10, 1986 memo in which *Layman* – not Xerox – placed qualifications on relocation. . . . There is no substantial evidence in the record that Xerox at any time prior to April 1987 promised Layman a specific job.

Pet. App. B at 35a (emphasis in original).

The uncontradicted evidence at trial demonstrates that Xerox substantially performed its promise to provide Layman a marketing job in Knight's organization in California. After she accepted relocation, Xerox processed Layman's relocation authorization form. PX-200713. At Layman's request, Xerox also arranged for Merrill Lynch to talk with Layman about selling her house in Lewisville. Through Merrill Lynch, Xerox bought her house, paid closing costs and then later sold the house at a loss.

In further performance of its promise to provide Layman a job in California, Xerox did the following:

1. Instructed Layman's managers to help her find a job;

2. Arranged an interview with Bill McKissock;

3. Paid for Layman to travel to California three times in order to look over the area and to interview for jobs and meet prospective new managers;

4. Suggested other managers for her to contact when McKissock's proposed organization did not materialize;

5. Offered her a California job in April 1987 with full relocation salary increase and benefits, which she rejected over the telephone without even wanting to see the documentation; and

6. Offered her a second job in July 1987 again with full relocation salary increase and benefits, which she also rejected, but not until after she enrolled in law school while ostensibly on vacation.

Both job offers fully complied with what Layman testified Knight promised: a marketing job in Knight's organization in El Segundo, California.

There is absolutely no evidence that Knight did not intend to perform his promise at the time he made it. The promise was not made just to Layman, but to thirty other employees who were as affected by the relocation as Layman was. It defies logic to argue that Xerox promised jobs in California to thirty people but intended to perform only for 29 of them and not for Layman. To believe that would require believing that Xerox (1) set up the 1986 relocation, (2) set up the October 7 meeting, (3) spent money to send employees to California, and (4) dissolved Layman's entire group just to make Layman a promise it was not going to keep. Layman's argument is legal and factual nonsense.

The trial court correctly granted Xerox' motion for JNOV. Pet. App. B at 36a-37a. As the Fifth Circuit held in confirming the JNOV, "the record in this case is *overwhelmingly* contrary to the jury's finding that Xerox intended to defraud Layman." Pet. App. A at 12a (emphasis in original).

CONCLUSION AND REQUEST FOR DAMAGES

From the trial court's granting of Xerox' motion for JNOV through the decision of the court of appeals, this case has involved nothing more than a review of the record to determine the sufficiency of Layman's evidence. Both courts held that she had not proved her case, and now she wants this Court to look at the record again. More important, however, there is no conflict among the circuits as to the standards for determining the existence of a continuing violation which will toll limitations in age cases. Layman has no basis for arguing the existence of a conflict, since the very circuits she identifies as being in conflict actually apply the same standards as the Fifth Circuit and even cite to the Fifth Circuit cases which Layman contends are an aberration from the "majority" of circuits. Layman's petition is frivolous and should be denied. Costs, damages and other appropriate relief should be awarded to Xerox pursuant to S. Ct. R. 42.

Respectfully submitted,

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